

555 Eleventh Street, NW Mail Station 07 Washington, DC 20004-1304 Sender's Direct Line: 202.365.0325

KB@KarenBrinkmann.com

SUBJECT TO SECOND PROTECTIVE ORDER IN WT DOCKET NO. 12-4 BEFORE THE FEDERAL COMMUNICATIONS COMMISSION – REDACTED – FOR PUBLIC INSPECTION

August 2, 2012

BY ELECTRONIC FILING

Marlene H. Dortch, Secretary Federal Communications Commission 445 Twelfth Street, SW Washington, D.C. 20554

Re: Application of Cellco Partnership d/b/a Verizon Wireless and

SpectrumCo LLC for Consent to Assign Licenses;

Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC for Consent to Assign Licenses,

WT Docket No. 12-4 – Notice of *Ex Parte* Communication

Dear Ms. Dortch:

On behalf of FairPoint Communications, Inc. ("FairPoint") and Frontier Communications Corporation ("Frontier"), this letter is responsive to questions raised in my meeting with Louis Peraertz in the office of Commissioner Clyburn on July 16, 2012 concerning the above-captioned applications for assignment of license (the "Applications"). In that meeting, Mr. Peraertz and I discussed the seven conditions proposed by the Midsize Carriers, through ITTA, and supported by FairPoint and Frontier in letters filed in this proceeding on July 10, 2 specifically that the Commission:

See Letter from Karen Brinkmann, Counsel to FairPoint, to Marlene H. Dortch,
Letter from Genevieve Morelli, ITTA, to Marlene Dortch in WT Docket No. 12-4
(filed July 10, 2012); Letter from Karen Brinkmann, counsel to FairPoint, to Marlene H. Dortch, FCC Secretary, in WT Docket No. 12-4 (filed July 10, 2012); Letter from Kathleen Q. Abernathy of Frontier and Eric N. Einhorn of Windstream Communications to Marlene H. Dortch, FCC Secretary, in WT Docket No. 12-4 (filed July 10, 2012).

Marlene H. Dortch, Secretary Federal Communications Commission August 2, 2012 Page 2 of 13

- 1. Prohibit preferential backhaul arrangements among the Applicants.
- 2. Prohibit discrimination in access to video content controlled by any of the Applicants.
- 3. Prohibit discriminatory or proprietary technical standards for hand-off between wireless and wireline networks, data sharing, content storage and access to competitive networks.
- 4. Prohibit the Applicants from enforcing data usage limits on customers using unaffiliated service providers unless the same data usage limits apply to their own customers.
- 5. Prohibit exclusivity in broadband retail offerings by Verizon Wireless.
- 6. Require the Applicants to follow the same porting processes that are required of telecommunications carriers under Part 64 of the Commission's rules.
- 7. Prohibit the cable Applicants from discriminatory or exclusionary sales practices for cable advertising.

Mr. Peraertz asked about the expected effects of the pending transactions on competition in markets served by FairPoint and Frontier, and how the Midsize Carriers' proposed conditions would address those effects. This letter is offered in further response to that inquiry.

1. The Commission should prohibit preferential backhaul arrangements among the Applicants. The Commercial Agreements provide that in all future backhaul capacity purchases in territories served by the cable system operators ("MSOs"), Verizon Wireless ("VZW") will [BEGIN HIGHLY CONFIDENTIAL]

Marlene H. Dortch, Secretary Federal Communications Commission August 2, 2012 Page 3 of 13

[END HIGHLY CONFIDENTIAL]³

These provisions thus will have the effect of stifling competition for backhaul. Backhaul for wireless networks already is a significant source of revenues to many, if not most, local exchange carriers ("LECs"). As wireless providers increasingly deploy microcell architectures to address the exploding demand for bandwidth, wireless backhaul will be critical to the viability of mobile wireless broadband as well as residential fiber-based broadband deployments.⁴ Cable companies already have a substantial market share advantage in residential broadband deployment.⁵

Comparable provisions are found in the other VZW Agent Agreements. A comparable provision also is found in the Reseller Agreements for each MSO. *See, e.g.*, Reseller Agreement with Comcast § 6.21.

See Letter from Tara S. Emory, Counsel to Sprint Nextel Corp., to Marlene H. Dortch, WT Docket No. 12-4 at 2-3 (filed July 25, 2012) ("Broadband wireline network access is an essential wireless input because, among other things, it is required to support WiFi and small-cell components of the heterogeneous networks that all wireless carriers will need to maximize spectrum efficiency, maintain network quality, and remain effective competitors in the future....As consumer data tonnage explodes, wireless carriers will require heterogeneous networks to increase capacity"); id. at 3 ("Sprint and the smaller mobile carriers cannot build WiFi networks of their own").

See id. at 3 ("The only potential competitors to the ILECs for small-cell backhaul facilities are the cable companies"). See also Letter from William B. Wilhelm, Counsel for Vonage Holdings Corp., to Marlene H. Dortch, WT Docket No. 12-4 at 2 (filed July 23, 2012) ("With the elimination of Verizon Communications' standalone DSL service and the cessation of additional deployment of FiOS service, most consumers in Verizon Communications' regions will be left with a single choice for wireline broadband services not tied to a voice telephony service – their cable provider – to the extent broadband is provided at all"); Letter from Catherine R. Sloan, Vice President, Government Relations for Computer & Communications Industry Association, to

Marlene H. Dortch, Secretary Federal Communications Commission August 2, 2012 Page 4 of 13

As described in the *FairPoint July 18 Letter*, FairPoint and Frontier both are backhaul capacity providers to wireless carriers throughout their service areas. Any substantial reduction in their backhaul business would likely have a significant impact on their investment decisions, including the speed of their broadband deployment in rural markets. Indeed, in many rural locations, there would be no business case to deploy residential broadband were fiber not being deployed first for wireless backhaul.⁶

Moreover, removing such a substantial customer from the market is likely to undermine the competitive backhaul market in its entirety over time, harming not just the LECs but also competitive wireless providers, who no longer will have access to multiple alternatives for carriage of wireless voice and broadband traffic, and will not have access to backhaul from the MSOs on the same terms as VZW. Indeed, the co-dependent relationship among the Applicants creates a strong disincentive for the cable companies to offer backhaul to VZW's competitors at all. The additional contractual provisions discussed below further support this conclusion.

The proposed backhaul condition would address these anti-competitive effects by prohibiting the Applicants from discriminating in backhaul arrangements against

Marlene H. Dortch, WT Docket No. 12-4 at 2 (filed July 17, 2012) ("In these increasingly concentrated and lopsided markets with asymmetrical competition at best, Sprint is the first line of defense against a mobile broadband duopoly and the ITTA companies are the first line of defense against a residential landline monopoly").

- See FairPoint July 18 Letter at 2. See also Letter from Melissa Newman, Vice President, Federal Regulatory Affairs for CenturyLink, to Marlene H. Dortch, WT Docket No. 12-4 at 2 (filed July 13, 2012) ("as wireless providers deploy microcell architectures, wireless backhaul will be even more critical than it is today to the viability of residential fiber-based broadband deployments. In this regard, cable companies already have a substantial market share advantage in residential broadband deployments").
- Numerous filings in this proceeding have documented the essential nature of wireless backhaul facilities to competition. *See* Letter from Tara S. Emory, Counsel to Sprint Nextel Corp., to Marlene H. Dortch, WT Docket No. 12-4 at 2-3 (filed July 25, 2012); Letter from David H. Pawlik, Counsel to Sprint Nextel Corp., to Marlene H. Dortch, WT Docket No. 12-4 at 2 (filed June 20, 2012); Letter from David H. Pawlik, Counsel to Sprint Nextel Corporation, to Marlene H. Dortch, WT Docket No. 12-4 at 2 (filed May 25, 2012); Reply Comments of Level 3 Communications, LLC, WT Docket No. 12-4 at 8 (filed Mar. 26, 2012).
- 8 See Sprint Reply Comments at 14.

Marlene H. Dortch, Secretary Federal Communications Commission August 2, 2012 Page 5 of 13

competitors and in favor of each other. It would serve the public interest without diminishing any of the other alleged public interest benefits of the proposed transactions. FairPoint and Frontier urge its adoption as a condition to consummation of these transactions.

2. The Commission should prohibit discrimination in access to video content controlled by any of the Applicants. Access to video programming at fair market rates is a critical input for broadband delivery platform providers, and discrimination against unaffiliated platform providers should be prohibited where, as here, those who control the content seek FCC approval to increase their concentration in the distribution market. The Applicant-MSOs are in a position to control multichannel video programming access in markets in which, until now, they have been willing to sell programming to competing broadband operators. For example, Frontier offers fiber-based broadband service in parts of its local exchange service territory, and currently purchases approximately 20 channels of video programming from the MSOs. If the Commission approves the pending transactions, however, the Applicant-MSOs can be expected to discontinue competitive video programming offerings, or make programming available to independent competitors only on terms less favorable than the terms on which they offer it to VZW and other Verizon affiliates, and similarly discriminate against end-users who choose a competitor. The commission approves the pending transactions affiliates, and similarly discriminate against end-users who choose a competitor.

Under the MSO Agent Agreements, VZW is made a sales agent of the MSOs' [BEGIN HIGHLY CONFIDENTIAL] [END

See, e.g., Cablevision Systems Corp. v. FCC, 649 F.3d 695, 704 (D.C. Cir. 2011) ("To address unfair conduct by cable-affiliated programmers who provide *only*

terrestrially delivered programming, the Commission imposed vicarious liability on the cable operator or covered satellite programmer where the complainant 'establish[ed] that the [terrestrial] programmer is wholly owned by, controlled by, or under common control with one or more of these entities.' The Commission explained that vicarious liability was 'necessary to give [s]ection 628(b) practical effect.' Otherwise, a cable-controlled terrestrial program supplier could circumvent the regulations by 'insist[ing] that a competitive MVPD pay an exorbitant rate,' thereby 'achieving the same result as an exclusive contract'" (citations omitted) (emphasis and brackets in original)).

Indeed, Time Warner Cable has publicly stated that it intends to provide enriched offerings only to customers who subscribe to both the cable MSO and VZW. *See* Letter from Harold Feld, Public Knowledge, to Marlene H. Dortch, WT Docket No. 12-4 (filed June 29, 2012) at 3 (*citing* S. Donohue, "How will Time Warner Cable and Verizon Wireless innovate?" FIERCE CABLE (Apr. 26, 2012)).

Marlene H. Dortch, Secretary Federal Communications Commission August 2, 2012 Page 6 of 13

HIGHLY CONFIDENTIAL] services, and the MSOs agree to pay VZW for [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] While the compensation provisions are substantially redacted, unavailable even to those who have agreed to the terms of the Second Protective Order, the portions of the agreements that can be viewed suggest a strong disincentive for the MSOs to sell their affiliated programming to companies such as Frontier that may compete in their service areas. They also prohibit VZW from **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL]

In a parallel provision, the VZW Agent Agreements prohibit the MSOs from [BEGIN HIGHLY CONFIDENTIAL]

11

[END HIGHLY CONFIDENTIAL]

In all but name, these agreements accomplish the same result as a merger of multi-channel video programming distributors ("MVPDs") would do. In such circumstances, the Commission has found it appropriate to impose program access conditions.¹² Such conditions are appropriate to help ensure that the increased market

The size is redacted, even from the Highly Confidential versions of this agreement.

See Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, First Report and Order, 25 FCC Rcd 746, ¶ 39 (2010) ("in some cases the effect of denying an MVPD the ability to provide certain terrestrially delivered, cable-affiliated programming may be to significantly hinder the MVPD from providing video programming in general, including satellite cable programming and satellite broadcast programming, as well as terrestrially delivered programming. The result of this conduct may be to discourage MVPDs from entering new markets or to limit the ability of MVPDs to provide a competitive alternative to the incumbent cable operator. The reduction in robust competition in the video distribution market that results may allow cable operators to raise rates and to refrain from innovating, thereby adversely impacting consumers" (citations omitted)). See also

Marlene H. Dortch, Secretary Federal Communications Commission August 2, 2012 Page 7 of 13

concentration caused by the transactions will not foreclose competition from still-independent platform providers such as Frontier or FairPoint. The Commission may impose this condition to promote public access to greater diversity of content and distribution platforms, without diminishing any of the other alleged public interest benefits of the proposed transactions.

3 & 4. The Commission should prohibit discriminatory or proprietary technical standards for hand-off between wireless and wireline networks, data sharing, content storage and access to competitive networks; and prohibit the Applicants from enforcing data usage limits on customers using unaffiliated service providers unless the same data usage limits apply to their own customers.

FairPoint and Frontier address in tandem the next two proposed conditions, as they are responsive to those aspects of the Commercial Agreements that will foreclose future intermodal competition by making it impossible for competing wireline and wireless broadband providers to gain access to customers and provide competitive services in a limited bandwidth environment. The cumulative effect of the arrangements described below will be (a) discrimination against competing wireless providers by the MSOs, (b) discrimination against competing wireline broadband providers by VZW, and (c) the inability of end-users to gain access to the services offered by competitors such as FairPoint and Frontier.

First, the Commercial Agreements practically guarantee that each party will cross-sell the other's and only the other's services. Specifically, VZW and the MSOs agree to **[BEGIN HIGHLY CONFIDENTIAL]**

Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses, Memorandum Opinion and Order, 26 FCC Rcd 4238 (2011).

See generally Balhoff & Williams, LLC, "Verizon Wireless Agreements with Four Cable Companies: Protecting Against the Consequences of Industry Concentration," July 2012, submitted for the record as an attachment to Letter from the Independent Telephone & Telecommunications Alliance, WT Docket No. 12-4 (filed July 18, 2012).

Marlene H. Dortch, Secretary Federal Communications Commission August 2, 2012 Page 8 of 13

14

[END HIGHLY CONFIDENTIAL]

Second, VZW and the MSOs have created a joint venture whose apparent purpose is to develop, use and license proprietary technology designed to give the member companies a competitive advantage in the broadband market. As explained above, due to consumer demand, the broadband market is evolving to incorporate both wireline and wireless components in a single retail offering. The Limited Liability Company Agreement of Joint Operating Entity, LLC ("JOE Agreement") defines its [BEGIN HIGHLY CONFIDENTIAL]

A comparable provision appears in the Reseller Agreements. *E.g.*, [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]

Marlene H. Dortch, Secretary Federal Communications Commission August 2, 2012 Page 9 of 13

[END HIGHLY CONFIDENTIAL]

The development of proprietary technology in itself may lead to any number of outcomes. However, in combination with the exclusive and preferential sales and marketing arrangements described in the other Commercial Agreements, the JOE Agreement should give the Commission grave concern for the future of competition. The cumulative effect of these provisions is clear: In markets where companies such as FairPoint and Frontier offer fixed voice and broadband services, but no mobile service, they will be at a severe competitive disadvantage because VZW and the MSOs have created strong incentives to lock customers into their jointly sold service packages and proprietary technologies, and discriminate against customers that attempt to choose an alternative broadband provider such as FairPoint or Frontier. In markets where VZW's wireless competitors offer mobile voice and broadband services, but no residential wireline service, they will be hard-pressed to remain competitive with VZW, because the Applicants have no incentive to provide backhaul, WiFi, or other necessary inputs.

As consumers' wireless bandwidth consumption continues to grow, it should be expected that the Applicants will favor customers of their combined services, and offer them mobile wireless bandwidth and speeds not available to customers who would otherwise prefer a competitor's fixed broadband product. This will discourage VZW customers from seeking out competitive broadband alternatives such as those offered by FairPoint and Frontier in territory served by the MSOs. For example, a VZW customer who subscribes to one of the MSOs' broadband services could be offered a package in which his mobile wireless minutes do not "count" against his total broadband bandwidth, but the VZW customer who subscribes to FairPoint broadband would face bandwidth caps. 15

Verizon CEO Lowell McAdam admits that VZW expects to constrain, by pricing or otherwise, wireless end-user capacity consumption, and the VZW business plan will favor the customer that subscribes to VZW mobile services *and* the MSOs' broadband services. He explains that the company intends "to shift as much [mobile traffic] onto FiOS or onto the fixed network where we can and then provide – use that capacity to provide those higher demand services like video." P. Dampier, "Verizon CEO Ponders Killing Off Rural Phone/Broadband Service & Rake In Wireless Profits," Stop the Cap!, July 17, 2012, *available at*: http://stopthecap.com/2012/07/17/verizon-ceo-ponders-killing-off-rural-phonebroadband-service-rake-in-wireless-profits.

Marlene H. Dortch, Secretary Federal Communications Commission August 2, 2012 Page 10 of 13

The same harmful effect will occur in the inverse to competing wireless providers, who will not be able to sell their mobile services to customers of the MSOs, or will find that their customers are discriminated against in the integration of their home broadband networks with non-VZW mobile services. Moreover, as capacity demand grows, intermodal competition becomes more challenging, as wireless companies are capacity constrained. The use of microcells and WiFi will be required if mobile broadband providers are to remain competitive. The MSOs that previously have been willing to extend WiFi capacity to mobile wireless service providers that compete with VZW, cannot be expected to continue doing so, in light of the arrangements the MSOs have struck with VZW.

In short, the Commercial Agreements will foreclose future intermodal competition by making it impossible for competing wireline and wireless broadband providers to gain access to customers and provide competitive services in a limited bandwidth environment. Conditions (3) and (4) are intended to address these anti-competitive effects. They would serve the public interest by prohibiting unreasonably discriminatory practices and promoting competition, without diminishing any of the alleged public interest benefits of the proposed transactions. FairPoint and Frontier urge adoption of these conditions.

5. The Commission should prohibit exclusivity in broadband retail offerings by Verizon Wireless. The Commercial Agreements further cement the marriage of VZW wireless offerings and the MSOs' wireline offerings by providing for joint retail sales of these services. For example, under [BEGIN HIGHLY CONFIDENTIAL]

17 E.g., [BEGIN HIGHLY CONFIDENTIAL]

See Letter from Tara S. Emory, Counsel to Sprint Nextel Corp., to Marlene H. Dortch, WT Docket No. 12-4 at 3-4 (filed July 25, 2012) ("If Sprint's customers were to be prohibited from attaching femtocells to their personal broadband wireline network or their devices were prohibited from attaching to WiFi networks, or if the access were degraded or subject to discriminatory fees, Sprint's customers would be significantly harmed because they would lose the benefits of the stronger signals and faster speeds that [Sprint] femtocells and WiFi networks provide").

Marlene H. Dortch, Secretary Federal Communications Commission August 2, 2012 Page 11 of 13

[END HIGHLY CONFIDENTIAL] Thus, any FairPoint or Frontier wireline customer who visits a VZW store or website to inquire about mobile services will likely be offered incentives to purchase residential broadband from the MSO at the same time. Especially given the technology integration and sales incentives discussed above, this type of tying at the retail point-of-sale is likely to drive smaller competitors from the market.¹⁹

The proposed condition addresses this assault on local competition by simply prohibiting exclusivity at the retail level. If VZW markets the services of the MSOs under the contractual provision just cited, VZW may comply with the proposed condition by offering customers a complete list of the wireline voice, video and broadband alternatives at the customer's location. Just as the equal access requirements imposed on incumbent LECs helped ensure that nascent long-distance competition could develop before local exchange competition had taken hold, such a condition would prevent the creation of a new bottleneck before broadband competition has fully taken root. It would permit VZW the freedom to market its own services as well as those of its MSO partners, without creating an anti-competitive barrier to customer broadband access.

6. The Commission should require the Applicants to follow the same porting processes that are required of telecommunications carriers under Part 64 of the Commission's rules. Another harm of the proposed transactions will likely occur in the handling by the MSO Applicants of customer inquiries about competitive services. The

18 [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

See, e.g., Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, supra, note 12. See also Comments of Verizon, MB Docket No. 07-198 at 13 (filed Jan. 4, 2008) ("the cable incumbents' history of abuses aimed at staving off competition is now well documented, including in particular the incumbents' use of the terrestrial loophole to harm new entrants. These practices continue today, with vertically integrated cable operators exploiting their control over RSNs and HD feeds of programming covered by the program access rules in order to protect their position in the video market to the detriment of consumers. Also, while the immediate promise of increased video competition at the time of the adoption of Section 628 came largely from satellite providers – thus explaining the focus on satellite delivered programming – the promise for increased competition now largely comes from wireline competitors to the cable incumbents").

Marlene H. Dortch, Secretary Federal Communications Commission August 2, 2012 Page 12 of 13

Commission previously has found fault with Verizon's handling of requests to change customers from Verizon to an alternative broadband provider, citing violations of the porting provisions of its rules.²⁰ As the Commission has acknowledged, cable companies currently do not follow the same rules as telecommunications carriers in responding to requests to port a customer to an alternative MVPD.²¹ As a result, customers of the MSOs are likely to be the subject of intense retention marketing any time the MSOs fear losing a customer to a competing broadband provider, particularly because of the strong incentives for customer retention, and disincentives for early termination, under the Commercial Agreements. *See, e.g.,* [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL].

A reasonable solution is to require that the Applicants comply with the same porting processes that apply to telecommunications carriers under Part 64, Subpart K of the Commission's rules. Under these rules, an MSO would be prohibited from refusing to complete or unreasonably delaying a customer port to an alternative broadband provider. This condition would be simple to administer and create a more equitable marketing environment, in which carriers and cable operators both must respect customers' competitive choices. FairPoint and Frontier urge adoption of this condition.

7. The Commission should prohibit the cable Applicants from discriminatory or exclusionary sales practices for cable advertising. The final condition proposed for this transaction also is designed to ensure that competing broadband providers have a reasonable opportunity to market their services to customers without restricting the activities of the Applicants in any harmful way. Specifically, this condition would prohibit the MSOs from charging above-market prices or refusing to carry advertising from a competing broadband or wireless service provider. This condition responds to the incentives created in the Commercial Agreements for the MSOs to promote only their own services and those of VZW.

As explained above, the VZW Agent Agreements prohibit the MSOs from [BEGIN HIGHLY CONFIDENTIAL]

See Bright House Networks, LLC, et al. v. Verizon California, Inc., et al., Memorandum Opinion and Order, 23 FCC Rcd 10704 (2008).

²¹ *Id.*, 23 FCC Rcd at 10720.

²² 47 C.F.R. §§64.1100 et seq.

²³ 47 C.F.R. §64.1120(a)(2).

Marlene H. Dortch, Secretary Federal Communications Commission August 2, 2012 Page 13 of 13

[END HIGHLY CONFIDENTIAL] Moreover, the MSOs have agreed that the JOE will be their [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY

CONFIDENTIAL] It is a reasonably foreseeable outcome of these agreements that the MSOs will develop exclusive service bundles and proprietary platforms for distribution of their video content. The proposed condition simply would prohibit the MSOs from denying carriage to advertisements for competing services and platforms. It will serve the Commission's pro-competition goals without detracting from any alleged public interest benefits of the transaction.

Conclusion

For the reasons described above and in their prior filings, FairPoint and Frontier urge the Commission not to grant the pending Applications without appropriate conditions. The absence of effective safeguards could cut the LECs out of the backhaul market as well as significantly impede their ability to compete in the residential broadband market. The conditions proposed by FairPoint and Frontier, and supported by other Midsize Carriers, are reasonable responses to the transaction before the Commission, will promote competition and protect consumers, and will not impede the achievement of any other alleged benefits of the proposed transactions.

Please direct any questions concerning this matter to me.

Very truly yours,

Karen Brinkmann
Counsel to FairPoint and Frontier

cc: Louis Peraertz